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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-494

ADOLPH K. KRAUSE AND JANET S. KRAUSE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CALVIN EISENBERG
DONALD A. STATLAND
10 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

October, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Adolph K. Krause and Janet S. Krause, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 30, 1974.

OPINIONS BELOW

A. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 497 F.2d 1109 (1974) and appears in the Appendix A hereto.

B. The opinion of the United States Tax Court is reported at 57 T.C. 890 (1972), and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 30, 1974. A timely petition for rehearing was denied on July 30, 1974 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court below properly determined that irrevocable trusts created by Petitioners, were not *bona fide* partners in a valid limited partnership and thereby properly disregarded the congressional mandate accepting the validity of a partnership, which includes trusts, as expressed in Section 704(e) of the Internal Revenue Code of 1954.

2. Whether the Court below properly applied to the instant income tax case, the reciprocal trust doctrine which had been accepted by the Supreme Court in the estate tax decision of *U.S.* v. *Estate of Grace*.

STATUTORY PROVISIONS INVOLVED

The pertinent statutes are set forth in Appendix C, p. A28 *infra*.

STATEMENT OF THE CASE

This case involves asserted deficiencies in federal income taxes for the taxable years 1964, 1965 and 1966, totaling $97,654.07. A portion of these deficiencies result from the Commissioner's disregard, for federal income tax purposes, of valid irrevocable trusts as entities separate from the grantor of each trust for purposes of the family partnership provisions contained in Section 704(e) of the Internal Revenue Code of 1954. The

remaining portion of these deficiencies result from the misapplication to the instant income tax case of the reciprocal trust doctrine accepted by this Court in the estate tax case of *U.S.* v. *Estate of Grace*, 395 U.S. 316 (1969).

The United States Tax Court sustained the Commissioner.

Contrary to the principles governing the permissible retention of control of a trust recognized by this Court in *U.S.* v. *Byrum*, 408 U.S. 125 (1972), the United States Court of Appeals for the Sixth Circuit found Petitioners ". . . retained too many incidents of ownership for the trusts to be the real owners of the partnership interest. . . ." (Appendix A, pp. 2-3) and upheld the Tax Court's finding as to the first issue. In so doing, no standards were acknowledged by the Sixth Circuit. This failure to apply standards conflicts with the determination of the United States Court of Appeals for the Ninth Circuit in *Bateman* v. *U.S.*, 490 F. 2d 549 (C.A. 9, 1973). Secondly, the Court of Appeals misapplied this Court's decision in *U.S.* v. *Estate of Grace*, 395 U.S. 316 (1969) and approved the Tax Court's improper application of the reciprocal trust doctrine to this case.

The facts may be summarized as follows:

In 1959, Petitioners created and capitalized a Michigan limited partnership known as A. K. Company. The primary purpose of the partnership was to make investments. Petitioners each acquired a twenty percent (20%) general partnership interest and the remaining sixty percent (60%) limited partnership interest was acquired by Adolph Krause.

Contemporaneously, Mr. Krause created three irrevocable trusts naming his children as life beneficiaries and Mrs. Krause created three irrevocable trusts naming her grandchildren as life beneficiaries. The trusts for the benefit of the children were each funded with $100 and fifty (50) shares of Wolverine Shoe & Tanning Corporation (now Wolverine World Wide, Inc., and hereafter referred to as "Wolverine"). The trusts for the benefit of the grandchildren were each funded with $100 and twenty-five (25) shares of Wolverine stock.

The trust agreements further provided that upon the expiration of a twelve (12) year period, beginning with the creation of the trusts in 1959, the independent trustee of each trust was permitted to exercise discretion to distribute elements of principal and accumulated income to the "then" spouse of the grantor living at that time. Petitioners were ineligible to serve as trustees of any of the trusts.

Simultaneously with the execution of the partnership and trust agreements, Mr. Krause executed a series of documents wherein he agreed to sell his sixty percent (60%) limited partnership interest in A. K. Company to the six trusts in exchange for $100 and eighty percent (80%) of the income received by the trusts from A. K. Company for a period of sixteen (16) years. Fifteen percent (15%) of the limited partnership interest was purchased by each of the three trusts created for the benefit of the children and five percent(5%) was purchased by each of the three trusts created for the benefit of the grandchildren.

During the years at issue, the trusts received dividend and interest income from the A. K. Company partnership as well as from other investments. The Commissioner asserted deficiencies for the calendar years 1964 through 1966 on the basis that all the income received by the trusts was taxable to the Petitioners rather than to the trusts. Initially, Respondent claimed that the six trusts were not *bona fide* partners in the A. K. Company within the meaning of § 704(e) of the Internal Revenue Code of 1954 (26 U.S.C. § 704(e)). Secondly, the government asserted each Petitioner was taxable upon the non-A. K. Company income received by the trusts created by each Petitioner's spouse. This was based upon the assertion that the "reciprocal trust doctrine" accepted by this Court in the estate tax case of *United States* v. *Estate of Grace*, 395 U.S. 316 (1969) is applicable to the instant income tax case.

Both the United States Tax Court and the U.S. Court of Appeals for the Sixth Circuit upheld the Commissioner's contentions.

REASONS FOR GRANTING WRIT

1. The Decision Below Conflicts With the Decision of the United States Court of Appeals for the Ninth Circuit in the Failure of the Court Below to Recognize Any Standard for Determining the Privileges Which the Donor of an Irrevocable Trust May Retain With Respect to the Trust Without Taxing the Income of the Trust to the Grantor.

The Court below has determined that Petitioners retained sufficient control over the irrevocable trusts which they created so as to preclude the trusts from recognition as partners in the A. K. Company partnership as specified in Section 704(e) of the Internal Revenue Code of 1954, (26 U.S.C. § 704(e)). The consequence was to approve the Commissioner's assertion that Petitioners were taxable upon the A. K. Company partnership income received by the trusts.

The Court recognized no standards in determining whether the control retained by Petitioners was excessive and ignored the decision of the United States Court of Appeals for the Ninth Circuit in *Bateman* v. *U.S.*, 490 F. 2d 549 (C.A. 9, 1973) decided on December 4, 1973 and heavily relied upon by Petitioners (Taxpayers' Reply Brief, pp. 6-7; Petition for Rehearing, pp. 3-4 [The decision was not published until after Petitioner had filed its opening brief.]).

The *Bateman* decision recognized the necessity of referring to the grantor trust provisions, (i.e., Sections 671 through 678, inclusive, of the Internal Revenue Code of 1954) as the legal standards to determine permissible control of trusts within the confines of Section 704(e).

In *Bateman*, the taxpayers were partners in a California limited partnership which engaged in the food brokerage business, mainly a service industry not requiring a substantial capital investment. Prior to the years before the Court, tax-

payers created trusts for the benefit of their children and named themselves as trustees. They then merely assigned, rather than sold, limited partnership interests in the California limited partnership to the trusts which received partnership income.

As in the instant case, the United States contended, in *Bateman*, that the trusts were not "real partners" under the family partnership provisions of the Internal Revenue Code, 26 U.S.C. § 704(e). Consequently, the government contended the partnership income received by the trusts was taxable to the Batemans, who should be treated as the "true owners" of the trusts.[1]

Contrary to the determination of the Court of Appeals in the instant case, the Court in *Bateman* rejected the government's argument. In relevant part, the Ninth Circuit stated (*supra* at p. 553):

> "The government next contends that the donors were the true owners of the trust and should be taxed on the trust income. *This challenge is based on the Batemans' positions as donors, trustees, remaindermen and general partners. While the Batemans have gone to the brink of permissible*

1. In relevant part, Section 704(e) provides,
"Family Partnerships.—

(1) Recognition of Interest Created by Purchase or Gift. —A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

(3) Purchase of Interest by Member of Family. . . . The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons."

In *Bateman*, the government also challenged the validity of the interests transferred to the trusts on the basis that the goodwill received by the trusts was not "capital" within the meaning of Section 704(e)(1). The Court rejected this argument. In the instant case the Respondent has admitted the trusts received valid capital interests in A. K. Company, a partnership in which capital is a material income producing factor. (See Brief for Appellee, pp. 7, 22.)

control and ownership, they have not crossed it. Congress has established strict requirements for a valid limited duration trust. *The Clifford Regulations (26 U.S.C. §§ 671 et seq.) provide a framework for proper trust procedure and the Batemans have stayed within it.* The Bateman trusts prohibited the trustees from exercising any of the powers enumerated in § 675, which would cause them to be treated as owners. *The trustees were directed to exercise their powers in a fiduciary manner, as indeed they were already obligated to do as general partners in dealing with their limited partners.* Cal. Corp. Code § 15509(1); *Wind* v. *Herbert,* 186 Cal. App. 2d 276, 8 Cal. Rptr. 817 (1960); *Nelson* v. *Abraham,* 29 Cal. 2d 745, 177 P. 2d 931 (1947). The trusts' duration was longer than ten years. Not only were the trusts in question drafted within the permissible framework, but there was no evidence that in fact the Batemans acted outside it. *The government contends that while there was no abuse here, there was potential, and therefore the trusts were invalid. However, in the absence of such abuse, the trusts must receive tax recognition." (Emphasis provided.)*

The Sixth Circuit's failure to recognize any standard for its determination thus creates a decided conflict between the Sixth and Ninth Circuits Courts of Appeal. Moreover, it is respectfully submitted that consideration of the legal standards and limits on retained control recognized in *Bateman,* i.e. the grantor trust provisions (26 U.S.C. §§ 671 et seq.), precludes the result reached by the Sixth Circuit in the instant case. The controls of the trusts retained by the donors in *Bateman* were more extensive than those retained by the petitioners in the instant case.[2] The Batemans appointed themselves as trustees of the trusts they established and had definite rights as remaindermen. To the con-

2. Contrary to the statement of the Sixth Circuit (Appendix A, p. A3), taxpayers *have not conceded* they retain numerous incidents of "ownership" over the trusts. To the contrary, taxpayers were not the owners of the trusts although they may have had certain elements of "control" over trust corpus. (See *U.S.* v. *Byrum,* 408 U.S. 125 (1972).) In fact, the Court recognizes, "The trust and granting taxpayer are separate tax entities" (Appendix A, p. A6).

trary, the trustees in the instant case were independent of the grantors, who had no assured rights in the twelve (12) year trusts they established.

Certainly the failure of the Court below to consider the standards acknowledged by the Ninth Circuit is contrary to the Congressional mandate set forth in section 671 of the Internal Revenue Code of 1954 (26 U.S.C. 671) which states, in relevant part:

> "No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart."

It is respectfully submitted a reconcilation of this conflict between Circuit Courts of Appeal is necessary to reach the goal of uniform interpretation and administration of the tax laws throughout the United States.

2. The Decision of the Court Below Conflicts with the Principles Applied by This Court in U.S. v. Byrum, 408 U.S. 125 (1972) in Determining the Separateness of a Trust From Its Grantor.

In *U.S.* v. *Byrum*, 408 U.S. 125 (1972), this Court held that the powers which the settlor of a trust held over trust income were not sufficient to impinge upon the *bona fide* nature of the trust nor to justify inclusion of trust property in the grantor's estate. It is submitted these principles are equally applicable to determining whether the grantor of a trust should be taxable upon the trust's income and the Court below improperly refused to apply these principles.

Byrum involved a decedent, Miliken C. Byrum, who died in 1964. In 1959, the decedent had created an inter-vivos irrevocable trust for the benefit of his children and transferred

to the trust portions of shares of stock which he held in three unlisted corporations. Byrum retained the right to vote the transferred stock which enabled him to exert an influence over the corporations which he would not otherwise have had. He also reserved the privilege of vetoing the transfer by the corporate trustee of any of the stock, as well as the right to remove the trustee and appoint another corporate trustee as successor. The instrument authorized the trustee in its "absolute and sole discretion" to pay the income and principal of the trusts to the beneficiaries within broad bounds.

The Commissioner attempted to include the transferred stock in the decedent's estate under Section 2036 of the Internal Revenue Code of 1954. He based his position on the argument that the decedent had retained the right to the enjoyment of property transferred during his lifetime or the right to the enjoyment of the income therefrom. In support of his position, the Commissioner emphasized that the grantor's retention of the right to vote the transferred shares and his right to veto the sale of the shares by the trustee resulted in:

(a) The grantor's effective retention of control over the dividend policy of the corporation he had previously controlled outright and

(b) The grantor's resulting ability to regulate the flow of income from the trust and thereby to shift the beneficial enjoyment of the trust income between the present beneficiaries and the remaindermen.

In rejecting the Commissioner's position, this Court indicated that the separateness of a trust is not to be disregarded simply because the grantor retains the ability to manage the trust assets. Accordingly, the grantor's retention of voting control over the corporation's stock did not give him such control as to justify inclusion of the trust corpus in his estate.

Moreover, the mere fact that the settlor had the power to vote shares held in the trust and to veto investments and reinvestments did no give him the right to control the income. The Court stated (*U.S.* v. *Byrum, supra* at pp. 137-138):

> "Whatever power Byrum may have possessed, with respect to the flow of income into the trust was derived not from an enforceable legal right specified in the trust instrument, but from the fact that he could elect a majority of directors of three corporations. The power to elect the directors conferred no legal right to command them to pay or not to pay dividends. A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests. . . . However great Byrum's influence may have been with the corporate directors, their responsibilities were to all shareholders and were enforceable according to legal standards entirely unrelated to the needs of the trust or to Byrum's desires with respect thereto."

Continuing, the Court stated (*U.S.* v. *Byrum, supra,* at pp. 141-142):

> ". . . If, in obedience to the will of the majority stockholder, corporate directors disregard the interest of shareholders by accumulating earnings to an unreasonable extent, they are vulnerable to a derivate suit. They are similarily vulnerable if they make an unlawful payment of dividends in the absence of earnings or available surplus or if they fail to exercise the requisite degree of care in discharging the duty to act only in the best interests of the corporation and its shareholders."

Accordingly, the Court concluded that Mr. Byrum did not have an unrestrained power to regulate the flow of dividends to the trust much less the right to designate who would enjoy the income from trust property.

It is to be further noted this Court observed, (*Byrum, supra,* p. 147):

> *"In none of the cases cited by the Government has a court held that a person has retained possession or enjoyment of the property if he has transferred title irrevocably, made complete delivery of the property and relinquished the right to income where the property is income producing." (emphasis provided)*

It is respectfully submitted that these principles are equally applicable to the instant case. This is apparent from a reading of the Congressional Committee Reports which discuss Section 704(e), and recognize restrictions upon complete and unfettered control by the trustee may exist. It is stated,

> *"Contractual restrictions may be of the character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as managing partner or in any other fiduciary capacity which . . . will not indicate any lack of true ownership in the transferee". (emphasis provided)* H.R. Rep. No. 586, 82nd Cong., 1st Sess., 33 (1951-2 Cum. Bull. 381); S. Rep. No. 781, 82nd Cong., 1st Sess., 40 (1951-2 Cum. Bull. 486).

Certainly the "restrictions" upon the limited partners' interests in A. K. Company, which provide the basis for the decision of the Court below to disregard the trusts as *bona fide* limited partners, are incident to normal relationships between partners and are no greater than those approved by this Court in *Byrum*. (See Appendix A, pp. A4-A5, see also Appendix B, A20). Initially, the requirement that Petitioners' approval as general partners be obtained for the assignment of a limited partner's interest is a normal incident to buy-sell agreements and has been recognized as a proper relationship among partners by the Michigan limited partnership law (Mich. Stats. Annot. Sec. 20.69(4) Appendix C, pp. A39-A40). It reflects no more control than Mr. Byrum's right to approve the transfer of stock by the corporate trustee.

Secondly, although there was no assurance that the capital contributions of the limited partners would be returned in any agreed time, the facts indicate that the limited partners received more than their capital contributions in three years before the Court alone. The limited partners' capital contributions to A. K. Company totaled $102,985.20 (I-R. 75). Their receipts for the three years before the Tax Court exceeded $150,000 (I-R. 82). Accordingly, the trusts were certainly not abused nor, as this Court recognized in *Byrum*, would the fiduciary responsibili-

ties of the trustees permit abuse. In addition, any failure by the general partners to permit these payments would have been an abuse of their fiduciary responsibility.

Moreover, in the instant case, neither grantor had the right to remove a trustee of the trust he created. Nor could a removed trustee be replaced with the grantor or his spouse. Consequently, this element of "control" which was present in *Byrum*, is not present in the instant case.

It is respectfully submitted that Congress clearly did not intend that enactment of Section 704(e) result in the nonrecognition of limited partnerships, which by statute are required to be managed by general partners. Participation by a limited partner in the management of the partnership would destroy the status of the limited partner as such. Clearly, the general partners have fiduciary obligations to the limited partners, whether they be individuals or other entities. Moreover, in the instant case, these duties were met. Distributions were made to the limited partners and timely payments were made by the trusts on the sales contract (See Brief for Appellants, pp. 9, 11, 38 (fn. 13)). Finally, this Court has recognized "control" of the source of income by the grantor of the trust does not establish prohibited control of that trust (See *U.S.* v. *Byrum*, *supra*, at 139-143).

Certainly, the finding by the Court below that "The trust and granting taxpayer are separate tax entities." (Appendix A, p. A6) and the demonstrated lack of prohibited "retained controls" necessitates recognition of the principles applied by this Court in *U.S.* v. *Byrum*, *supra*, with the result that the income earned by the trusts must be taxed to the trusts and not to the grantors.

3. The Court Below Misapplied the Reciprocal Trust Doctrine as Enunciated by This Court in U.S. v. Estate of Grace, 395 U.S. 316 (1969). The Reciprocal Trust Doctrine Was Accepted by This Court Solely for Determination of Estate Tax Liability and Was Improperly Applied by the Court Below to the Determination of Income Tax Liability in the Instant Case.

In addition to the A. K. Company partnership interests held by each of the six trusts, each of the trusts held shares of Wolverine stock. The three trusts created for the benefit of the children, which were funded by Mr. Krause, held fifty (50) shares of Wolverine stock. The three grandchildren's trusts, which were funded by Mrs. Krause, held twenty-five (25) shares of Wolverine stock. As the result of an erroneous application of the reciprocal trust doctrine enunciated by this Court in the estate tax case of *U.S.* v. *Estate of Grace,* 395 U.S. 316 (1969), the Court below determined that Petitioners were taxable on the income arising from such holdings in the trust created by each Petitioner's spouse to the extent of mutual value, i.e., to the extent of the income on twenty-five (25)shares of stock per trust.

The "reciprocal trust doctrine" is a non-statutory concept initially developed by the U.S. Court of Appeals for the Second Circuit and accepted by this Court to prevent avoidance of estate taxes by the conveyance of property in return for the economic benefits which the conveyed property would have produced. See *Lehman* v. *Commissioner,* 109 F. 2d 99 (C.A. 2, 1940), *Cert. den.* 310 U.S. 637 (1940); (See also *U.S.* v. *Estate of Grace,* 395 U.S. 316 (1969).

In *United States* v. *Estate of Joseph P. Grace, et al.,* 395 U.S. 316 (1969) this Court upheld the application of the reciprocal trust doctrine to the computation of federal estate tax. The case involved a decedent, Joseph P. Grace, who had died in 1950. In 1908, Mr. Grace had married Janet Grace. Mr. Grace was a wealthy man at the time of his marriage. In comparison, his

wife had no wealth or property of her own at the time of the marriage. During the period from 1908 to 1931, the decedent had transferred to his wife a large amount of personal and real property.

On December 15, 1931, the decedent executed a trust instrument naming as Trustees himself, his nephew and a third party. The instrument directed the trustees to pay the income of the trust to Janet Grace during her lifetime as well as any portion of the principal which the majority of the trustees deem advisable. In addition, Janet Grace was given the power to designate by will or by deed the manner in which the trust estate remaining at her death would be distributed among decedent and their children. The properties given to the trust included securities and real estate owned by the decedent.

On December 31, 1931, Janet Grace executed a trust instrument which had virtually the same provisions as those contained in the trust created by Joseph Grace. *However, the properties donated to the Janet Grace trust consisted of the Grace family estate and corporate securities, all of which had been originally transferred to her by decedent in preceding years.*

Upon Joseph Grace's death in 1950, the Commissioner of Internal Revenue attempted to include the value of the Janet Grace trust in Joseph Grace's taxable estate. Referring to Section 811(c)(1)(B) of the Internal Revenue Code of 1939, this Court observed that the intent of the provision was to include in the decedent's taxable estate, property transferred by the decedent in which he retained a life interest, and observed that the reciprocal trust doctrine had been formulated, in response to attempts to draft instruments avoiding the terms of Section 811(c)(1)(B) but which enabled the decedent to effectively have lifetime enjoyment of his property.

The primary problem facing this Court in *Grace* was whether a necessary prerequisite for the application of the reciprocal trust doctrine to the estate tax area was that there be a showing that the decedent had established his trust in consideration for,

or as a *quid pro quo* for, the trust of which he had been made a beneficiary. It was decided *quid pro quo* was not a necessary prerequisite. The Court held that (p. 324):

> " . . . application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been had they created trusts naming themselves as *life beneficiaries.*" (Emphasis provided.)

Accordingly, in *Grace,* the trust which the decedent's wife had established for the decedent's benefit was held to be includable in the decedent's estate for estate tax purposes.

It is apparent this Court considered the doctrine appropriate solely in the context of an estate tax case where it was clear the beneficiary of the trust had the same economic benefits as he would have had had he been the *current* or *life beneficiary* of a trust established for his own benefit. Moreover, this Court predicated application of the reciprocal trust doctrine upon an affirmative showing by the Commissioner of Internal Revenue that the decedent had furnished all the property of the trusts created by him and his wife; that the decedent effectively controlled his wife's desires with respect to the creation of the trust, and finally, the decedent and his wife were left in nearly the same economic condition. These facts would serve to establish that the trusts were interrelated without the necessity of a direct showing that one trust was furnished in consideration for the other. The latter fact could readily be surmised from the noted surrounding circumstances. (See also *Lehman, supra.*)

In reaching its conclusion to affirm the decision of the Tax Court in the instant case, the Sixth Circuit Court of Appeals failed to address itself to the threshold question of whether the reciprocal trust doctrine may properly be applied to the *income tax issue* before the Court in the instant case. Certainly the Congress was more specific in delineating the criteria for determining the grantor of a trust for the purpose of computing the

taxable income of the grantor of a trust than for determining the includability of the corpus of the trust in a decedent's estate. As Section 671 of the Internal Revenue Code of 1954 (26 U.S.C. § 671) states, in relevant part,

> "No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart."

Moreover, Section 678 of the Internal Revenue Code of 1954 (26 U.S.C. § 678) specifically provides the circumstance where someone other than the creator or grantor of the trust may be considered the substantial owner. No such provisions were set forth by the Congress with respect to the estate tax. Certainly the presence of these provisions with respect to income tax determinations precludes the application of the reciprocal trust doctrine to determination of taxable income.

Moreover, Petitioners' contingent interests in the trusts affords them none of the economic assurances which accrued to Mr. Grace. In fact it is questionable whether the trusts created by Petitioners were reciprocal, although the Court below assumed they were. Neither taxpayer was a life beneficiary of the trusts created by his spouse. Rather each taxpayer had only the mere possibility of receiving a benefit from the trust created by his spouse. This possibility was subject to the conditions precedent that:

(a) Both taxpayers would be living and married to each other upon the expiration of twelve years from the creation of the trusts which were created in 1959.
(b) The independent trustees would exercise their discretion in favor of distributing to the spouse of the grantor rather than in favor of the children or grandchildren.

The lower Court's application of the reciprocal trust doctrine to remote contingent remainder interests is novel both for estate

and income tax purposes. Taxpayers submit it is an erroneous application and should be reviewed by this Court. *Neither Petitioner meets the standards set forth in the Grace decision of being in the same economic position as a result of being the grantor of the "reciprocal" trust.*

This Court has not yet spoken as to the applicability of the reciprocal trust doctrine to the computation of income tax liability. It is respectfully submitted, this case demonstrates the need for the Court to do so.

CONCLUSION

For the reasons stated, it is respectfully submitted this case provides an excellent opportunity for the Supreme Court to delineate the proper application of its decisions in *U.S.* v. *Byrum, supra,* and *U.S.* v. *Estate of Joseph P. Grace, supra,* as well as an opportunity to reconcile the demonstrated conflict between Circuit Courts of Appeal. Accordingly, it is respectfully requested that the Supreme Court grant a writ of certiorari to review the judgment and opinion of the Sixth Circuit in the instant case.

Respectfully submitted,

CALVIN EISENBERG
DONALD A. STATLAND
10 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioners

October, 1974

APPENDIX A.

No. 73-1866

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

ADOLPH K. KRAUSE and
JANET S. KRAUSE,
Petitioners-Appellants,
vs.
COMMISSIONER OF INTERNAL
REVENUE,
Respondent-Appellee.

Appeal from the Decision of the United States Tax Court.

Decided and Filed May 30, 1974.

Before PHILLIPS, *Chief Judge*, and WEICK, *Circuit Judge*, and WALINSKI, *District Judge*.*

PHILLIPS, Chief Judge. Mr. and Mrs. Adolph K. Krause (taxpayers) appeal from a decision of the United States Tax Court, per Judge Samuel B. Sterrett, upholding the Commissioner's determination of deficiencies in taxpayers' federal income tax for the taxable years 1964, 1965 and 1966. We affirm.

For a comprehensive statement of the facts, reference is made to the opinion of Judge Sterrett. 57 T.C. 890 (1972).

In 1959 taxpayers created and capitalized a Michigan limited partnership named A. K. Company. Contemporaneously, Mr. Krause created three trusts naming taxpayers' children as bene-

* Honorable Nicholas J. Walinski, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

ficiaries, and Mrs. Krause created three trusts naming their grandchildren as beneficiaries. The childrens' trusts were each funded with $100 and 50 shares of Wolverine Shoe & Tanning Corp. (now Wolverine World Wide, Inc.). The grandchildrens' trusts were each funded with $100 and 25 shares of Wolverine stock. Wolverine is an outgrowth of a partnership begun by the Krause family in 1883, and in all years pertinent hereto Mr. Krause was president and a director of Wolverine.

Simultaneously with the execution of the partnership and trusts agreements, Mr. Krause executed a series of documents wherein he agreed to transfer his 60 per cent limited partnership interest in A. K. Company to the six trusts in exchange for $100 and 80 per cent of the income received by the trusts from A. K. Company for a period of 16 years. Fifteen per cent of the limited partnership interest was allocated to each of the three childrens' trusts and five per cent was allocated to each of the three grandchildrens' trusts.

The Commissioner, claiming that the six trusts were not bona fide partners in the A. K. Company within the meaning of § 704(e) of the Internal Revenue Code of 1954, 26 U.S.C. § 704(e), asserted deficiencies for the calendar years 1964 through 1966 on the basis that all the income received by the trusts was taxable to taxpayers rather than the trusts.

From the adverse decision of the Tax Court upholding deficiencies for the three years aggregating $97,654.07, taxpayers raise three issues on appeal: 1) Were the six trusts bona fide partners in the A. K. Company within the meaning of § 704(e) of the Code? 2) Were taxpayers liable for taxes on the income produced by 25 shares of Wolverine stock held by each of the six trusts? 3) Did the Tax Court err in computing the deficiencies?

I.

After considering all of the factors in this case, the Tax Court correctly found that taxpayers retained too many incidents of ownership for the trusts to be the real owners of the partnership interest. Reference is made to 57 T.C. at 898 for a convincing listing of these incidents of ownership.

Taxpayers do not contest that they retain numerous incidents of ownership over the trusts. Rather they contend that the Tax Court erred in that (a) the trusts are bona fide partners in A. K. Company within the plain language of § 704(e) of the Code, and (b) the principles established in *United States* v. *Byrum*, 408 U.S. 125 (1972), a case decided subsequent to the decision of the Tax Court, preclude taxation of the income received by the trusts to them.

Section 704(e) of the Code provides, in effect, that a person may be recognized as a partner for income tax purposes "if he *owns* a capital interest in a partnership in which capital is a material income-producing factor." (Emphasis added.) That section was enacted to prevent taxpayers from using the family partnership as a means of splitting family income and thus circumventing the progressive tax rate structure of the federal income tax. The legislative history of the section shows that Congress wanted the Commissioner and the courts to inquire into the question of whether the donee or the purchaser actually owns the purportedly transferred interest; and, in cases where the transferor retained incidents of ownership, it was the Congressional intent that he be taxable on the partnership's income. H. Rep. No. 586, 82d Cong., 1st Sess., p. 33; S. Rep. No. 781, 82d Cong., 1st Sess., pp. 39-40; 2 U.S. Code Cong. & Adm. News 1781, 1813-15 & 1969, 2008-10. Further, the Commissioner specifically implemented this Congressional purpose in Treas. Reg. § 1.704-1(e)(1)(iii). This court recognized the Congressional purpose in *Ballou* v. *United States*, 370 F.2d 659, 661-62 (1966).

We are, therefore, unpersuaded by taxpayers' contention that the plain language of § 704(e) supports taxpayers' claim that the trusts were bona fide partners in A. K. Company.

Further, taxpayers rely on *Byrum, supra,* a case in which the Supreme Court held that the powers which a settlor of a trust held over certain trust income were not so great as to require inclusion of the trust in his gross estate under § 2036 (a) of the Code. In *Byrum,* the settlor-decedent transferred to an irrevocable trust for the benefit of his children stock in three corporations which he controlled, retaining the right to vote the transferred stock, to veto the transfer by the trustee of any of the stock, and to remove the trustee and appoint another trustee as successor.

We conclude that *Byrum* is not controlling in the present case. The estate tax statute involved in *Byrum,* § 2036(a), is different, in terms of language, legislative history and objectives, from the income tax statute involved in the present case, § 704 (e). Section 704(e) recognizes a person as a partner for tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor. On the other hand, § 2036(a) requires the inclusion in decedent's gross estate of the value of any property which he has transferred by inter vivos gift, if he retained the enjoyment of the property for his lifetime or the right to designate who shall enjoy the income therefrom.

In addition to the fact that the present case involves a family partnership with entirely different language, legislative history and objectives than that contained in § 2036(a), taxpayers here retained greater incidents of ownership than did the settlor in *Byrum.* Taxpayers control the partnership in which the instant trusts purportedly "own" interests. They are the dominant force in the corporation whose stock forms the principal partnership asset. They have contingent rights to trust income and principal under the trust instruments. Through their power to control the trustees they have the power to realize on those

contingencies. The Tax Court correctly concluded that taxpayers "retained a present income interest and reserved the right to reacquire the principal interest." 57 T.C. at 898.

We, therefore, hold that the six trusts were not bona fide partners in the A. K. Company within the meaning of § 704(e). Consequently, taxpayers are taxable on the income attributable to the partnership interest.

II.

In addition to the partnership interests held by the six trusts, each of the trusts held shares of Wolverine stock. The three childrens' trusts, which were funded by Mr. Krause, held 50 shares of Wolverine stock. The three grandchildrens' trusts, which were funded by Mrs. Krause, held 25 shares of Wolverine stock. The Tax Court determined that the taxpayers were taxable on the income arising from such holdings to the extent of mutual value, i.e., to the extent of the income on 25 shares of stock per trust. The court's conclusion in this regard was based on the application of the reciprocal trust doctrine enunciated by the Supreme Court in *United States* v. *Estate of Grace*, 395 U.S. 316 (1969), and by the grantor trust provisions contained in §§ 671 through 678 of the Code, specifically § 677(a)(2).

After careful consideration of the relevant trust provisions and the authorities cited by taxpayers, we hold that the Tax Court correctly decided this issue for the reasons set forth in its opinion. 57 T.C. at 899-903. See also, *Duffy* v. *United States*, 487 F.2d 282, 284-88 (6th Cir. 1973).

III.

Following the filing of the Tax Court's opinion, the deficiencies due from taxpayers were computed pursuant to Rule 50 of the Tax Court. Over the objections of taxpayers, the Tax Court adopted the Commissioner's computation.

On appeal, taxpayers maintain that the Commissioner's computation was erroneous in that (a) it failed to allow them a credit for the tax paid by the trusts in respect of the income subsequently taxed to taxpayers, and (b) it erroneously ignored the fiscal year of the trusts in determining the amounts to be included in taxpayer's income.

Section 671 of the Code admittedly provides that when a grantor is to be treated for tax purposes as the owner of a trust that the grantor is entitled to the same deductions and credits as the trust would be entitled to. That section does not, however, provide that the grantor-taxpayer is entitled to credit the taxes paid by the trust against his own tax liability. The trust and the grantor-taxpayer are separate tax entities. We refuse to permit one to offset a tax liability by claiming a credit for taxes paid by the other absent a statute or regulation permitting such procedure.

We likewise find no merit in taxpayers' assertion that the Tax Court erroneously ignored the fiscal year of the trusts in determining the amounts to be included in taxpayers' income. Although the trusts' fiscal years ended on January 31 (as opposed to the December 31 date on which taxpayers' taxable year ended), the Commissioner made a factual determination that all trust income taxed to taxpayers was realized during the year and that it was taxed to them. This determination is not challenged on appeal.

Affirmed.

APPENDIX A-1.

No. 73-1866

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

ADOLPH K. KRAUSE AND JANET S. KRAUSE,

Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, *Chief Judge*, WEICK, *Circuit Judge*, and WALINSKI, *District Judge*.*

No judge of the court having moved for rehearing in banc, the petition for rehearing has been considered by the hearing panel and found to be without merit.

It is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ JOHN P. HELMAN

Clerk

Filed

July 30, 1974

JOHN P. HELMAN, *Clerk*

* Honorable Nicholas J. Walinski, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

APPENDIX B.

ADOLPH K. KRAUSE AND JANET S. KRAUSE,

vs. *Petitioners,*

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 6125-69. Filed March 30, 1972.

On Feb. 5, 1959, petitioners executed a partnership agreement wherein they formed a limited partnership known as A. K. Co. Contemporaneously, petitioners created six trusts; Adolph created three trusts naming their children as beneficiaries, and Janet created three trusts naming their grandchildren as beneficiaries. The children's trusts were funded with $100 and 50 shares of Wolverine, while the grandchildren's trusts were funded with $100 and 25 shares of Wolverine. Simultaneous with the execution of the abovenoted documents, Adolph executed a series of agreements wherein he agreed to transfer his 60-percent limited partnership interest in A. K. Co. to the six trusts for $100 cash and 80 percent of the income received by the trusts from A. K. Co. for a period of 16 years. Fifteen percent of the limited partnership interest was allocated to each of the three children's trusts and 5 percent was allocated to each of the three grandchildren's trusts. *Held,* petitioners were the true owners of the limited partnership interest, and therefore the income attributable to such interest is taxable to them. *Held, further,* through the applicability of the reciprocal-trust doctrine and the grantor trust provisions petitioners are taxed to the extent of the income produced by 25 shares of Wolverine held by each of the six trusts.

Platt W. Dockery and *R. Malcolm Cumming,* for the petitioners. *Gary F. Walker,* for the respondent.

STERRETT, *Judge:* The respondent determined deficiencies in petitioners' Federal income tax for the taxable years 1964, 1965,

and 1966 in the respective amounts of $24,852.27, $30,843.80, and $42,878.31.

The issues presented for determination are:

(1) Whether the six trusts created by petitioners for the benefit of their children and grandchildren are bona fide partners in A. K. Co., a limited partnership.

(2) Whether the trusts are controlled by the grantor trust provisions, thereby causing the trusts income to be taxable to petitioners.

FINDINGS OF FACT

Some of the facts have been stipulated and the stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Adolph K. Krause and Janet S. Krause (sometimes hereinafter referred to as petitioners or Adolph and Janet), are husband and wife, whose legal address was Rockford, Mich., as of the date their petition was filed with the Tax Court. Their joint Federal income tax returns for the taxable years 1964, 1965, and 1966 were filed on the cash basis with the district director of internal revenue at Detroit, Mich.

On February 5, 1959, petitioners executed a partnership agreement pursuant to the Michigan Limited Partnership Statutes, wherein they created a limited partnership known as A. K. Co. The certificate of limited partnership filed with the Clerk of Kent County, Mich., characterized the business to be transacted as follows:

> To engage in any kind of commercial, industrial or mercantile enterprise, including, but not by way of limitation, to manufacture, produce, acquire, own, hold, rent, lease, sell, service otherwise dispose of or deal in, goods, wares and merchandise of every kind and description and any

class or kind of property that is or may become the subject of trade or commerce; to purchase, own, lease, exchange, improve, develop, deal in mortgage and pledge any and all real and personal property of every kind and nature, including rights, interests, franchises, licenses, privileges, patents, designs, processes and inventions; to acquire by purchase, subscription, contract or otherwise, and to hold, sell, exchange, mortgage, pledge or otherwise dispose of and deal in all forms of securities, including shares, stocks, bonds, debentures, notes, mortgages, evidences of indebtedness and certificates of interest by whomsoever issued; to act in any and all parts of the world in any capacity whatsoever as financial or business agent or representative, general or special; and to do all other acts and things incidental to or in the aid of any of the objects or purposes of this partnership.

The petitioners' capital contribution to A. K. Co. consisted of the following jointly held property.

2	apartment buildings,
18	shares Consumers Power Co., pref. 4.5%
92	shares Sears, Roebuck & Co.
75	shares Standard Oil of Indiana
15	shares Standard Oil of New Jersey
315	shares U.S. Steel Corp.
53	shares Dexter Industries, Inc.
17,965	shares Wolverine Shoe & Tanning Corp. (now Wolverine World Wide, Inc.)

The partnership books reflected a total capital contribution of $171,643.66 allocated as follows:

General partners	
Adolph K. Krause	$34,328.73
Janet S. Krause	34,328.73
Limited partners	
Adolph K. Krause	$102,985.20
Janet S. Krause	1.00

Petitioners agreed to allocate 40 percent of the net profits to the general partnership interest and 60 percent to the limited partnership interest. The 40-percent interest was divided equally between both petitioners while the 60-percent limited partnership interest was allocated solely to Adolph.

In reference to the limited partnership interest, the certificate of limited partnership stated, in part:

VIII.

There is no agreed time when the contributions of the limited partners are to be returned.

X.

The interests of all of the limited partners herein may be transferred on the approval of the general partners to accept a new assignee as a limited partner.

Contemporaneous with the execution of this partnership agreement, petitioners on February 5, 1959, created six trusts for the benefit of their children and grandchildren. Adolph entered into a trust agreement between himself and Old Kent Bank & Trust Co. and Sidney A. Veltman as cotrustees, creating three trusts: The Janice K. Ziegler Trust for the benefit of Janice K. Ziegler; the Shirley K. Brackett Trust for the benefit of Shirley K. Brackett; and the Jack A. Krause Trust for the benefit of Jack A. Krause (hereinafter referred to as the children's trusts). The trusts were each funded with $100 in cash and 50 shares of Wolverine Shoes & Tanning Corp. (hereinafter sometimes referred to as Wolverine).

Janet also executed a trust agreement creating three trusts: The Janice K. Ziegler's Children's Trust for the benefit of the children of Janice K. Ziegler; the Shirley K. Brackett's Children's Trust for the benefit of the children of Shirley K. Brackett; and the Jack A. Krause's Children's Trust for the benefit of the children of Jack A. Krause (hereinafter referred to as the grand-

children's trust). Jack A. Krause had no children at the time of the creation of the above-noted trust. Janet named the same trustees as had been selected by her husband. The trusts were each funded with $100 in cash and 25 shares of Wolverine.

The express provisions of each trust executed by the respective petitioners provided in pertinent part, as follows:

3. Beneficiaries of the Trusts

(a) * * *

The Trustees shall hold, invest and reinvest the principal of each such Trust and may accumulate the income therefrom, add the same to principal, or retain it as undistributed income, or may pay the same or any part thereof, at such times and in such manner * * * and in such shares * * * as the Trustees shall determine, in their sole and absolute discretion * * * to or for the benefit of each such first life beneficiary of each respective Trust, or to such first life beneficiary's spouse * * * or to the issue of such first life beneficiary or to any other issue of the Grantor.

(e) The Grantor hereby expressly disclaims and waives any and all interest in and control over the Trusts, or the property thereof, for himself and for his estate.

* * * * *

5. Powers of Trustees

(n) To terminate in whole or in part, any or all of such Trusts, at any time after the expiration of a period of twelve (12) years, commencing on the date the Trusts herein are created, and upon such termination, to pay the principal accumulations and unpaid income thereof to the then life beneficiary, if living; or if such first life beneficiary be dead, to the then living issue of such first life beneficiary; or if there be no such issue then living, in equal shares to the first life beneficiaries of the other Trusts, or if either of such first life bene-

ficiaries be dead, to such deceased first life beneficiary's issue then living; or if there be no such issue then living, to the surviving first life beneficiary, or if such life beneficiary also be dead, to his or her issue then living; if all of such first life beneficiaries and their respective issue be dead, to those who would take the Grantor's personal property under the laws of Michigan then in force had the Grantor died intestate.

* * * * *

Notwithstanding the foregoing, my Trustees shall also have the power in their sole and absolute discretion to make any such payment of principal and accumulated income upon termination hereunder to the * * * [spouse] of the Grantor if she [or he] be then living * * *.

7. Powers of Invasion of Principal

[O]r, if in the judgment of my Trustees, the principal of such Trust is needed for the care, comfort, and necessities of the Grantor's * * * [spouse], or for sickness or for emergencies of any nature whatsoever occurring to the Grantor's * * * [spouse], the beneficiaries of the Trusts, or their families, it shall become the duty of the Trustees to devote so much of the income, and if necessary, the principal of such Trust funds as may be required for the use of such person or persons and for such purpose or purposes, in the discretion of the Trustees. * * *

* * * * *

13. No Power of Revocation

The Trusts herein created shall be irrevocable. The Grantor intends by this instrument to divest himself of all rights, title and interest in the property herein given to the Trustees.

* * * * *

15. Resignation, Removal and Appointment of Trustees

(b) My * * * [spouse] * * * shall have the power to remove any Trustee * * *.

* * * * *

(d) I request that there always be at least two (2) Trustees hereof, and any successor Trustee shall be appointed by the Court of Chancery of Kent County, Michigan, provided, that neither I, my wife, nor any beneficiary of such Trusts shall be appointed a Trustee.

Simultaneous with the execution of the above-mentioned documents, Adolph and the cotrustees executed for additional contracts captioned "Agreement," "Bill of Sale," "Escrow Agreement," and a second "Bill of Sale."[1] These four documents contracted for the sale of Adolph's 60-percent limited partnership interest in A. K. Co. to the six trusts created by him and his wife.

Each "Agreement" provided for the transfer by Adolph of 15 percent of his limited partnership interest to each of the children's trusts and 5 percent of his limited partnership interest to each of the grandchildren's trusts in return for the payment of $100 in cash by each trust and 80 percent of the income distribution the trusts were to receive, for a period of 16 years, from their newly acquired interest in A. K. Co.[2] Payments were to be made on March 31 of each year. The transfer was subject to a lien in favor of Adolph in case of default by any of the newly created trusts.

The "Bill of Sale" executed by Adolph, conveyed the appropriate limited partnership interest to each of the six trusts.

The "Escrow Agreement," executed to implement the lien, provided for the depositing by the trustees of the newly acquired partnership interest as collateral to secure the performance of the conditions contained within the "Agreement." It provided in part:

1. Each of the four documents were executed six times, covering all six trusts.

2. In the event Trustees shall fail to make the payments, * * * as provided in the agreement * * * for a period of sixty (60) days after due date, then Krause, at his discretion and election, by delivering to Escrowee the written notice, may declare the aforesaid agreement null and void and thereby cause Escrowee to deliver to him the Bill of Sale deposited hereunder, in which event the transfer of said partnership interest to Krause shall be deemed complete, and any amounts which may have been paid to Krause by Trustees under said agreement shall be deemed forfeited.

3. Unless and until notice shall be given to Escrowee as provided in Paragraph 2 hereof, such transfer evidenced by the Bill of Sale executed pursuant to Paragraph 2 shall be deemed incomplete and ownership of such partnership interest shall be and remain in Trustees.

The second "Bill of Sale" merely reconveyed legal title in the limited partnership to Adolph. This document was deposited with the escrowee to hold until, either payment had been completed, or the trustees defaulted on the contract.

Immediately following the sale, on February 5, 1959, petitioners executed a certificate of amendment to the certificate of limited partnership of A. K. Co. It provided, in part:

The partners shall share in the net profits of the company in the following proportions:

General partners Name	Amount (percent)
(1) Adolph Krause	20
(2) Janet S. Krause	20

2. Eighty-percent income distributions calculated after reduction for expenses, trustees' fees, taxes, and distributions to beneficiaries up to 25 percent of trust income. No distributions were made to the beneficiaries prior to or during the years here in issue.

Limited partners Name	Amount (percent)
(1) Janice K. Ziegler Trust	15
(2) Shirley K. Brackett Trust	15
(3) Jack A. Krause Trust	15
(4) Janice K. Ziegler's Children's Trust	5
(5) Shirley K. Brackett's Children's Trust	5
(6) Jack A. Krause Children's Trust	5

The income of the six trusts for the years here in issue totaled $153,611.40 divided as follows:

Year ended	Dividends	Interest	A. K. Co.	Total
1/31/65 ..	$ 667.80	$210.03	$39,745.95	$40,623.78
1/31/66 ..	925.80	712.50	46,594.95	48,233.25
1/31/67 ..	1,091.70	—	63,662.67	64,754.37

A. K. Co. actually distributed a total of $126,000 to the six trusts for the years here in issue. Eighty percent of this figure reduced by expenses and taxes was required to be distributed to Adolph as payment for the limited partnership interest. These figures may be demonstrated as follows:

Year distribution applicable to	Distribution from A. K. Co.	Expenses	Taxes	80 percent of distribution less expenses and taxes
1964	$21,000	$510	$ 7,116	$10,699
1965	45,000	510	10,140	27,432
1966	60,000	570	15,015	35,532

The trustees made payments to Adolph pursuant to the "Agreement" in the amounts noted above. However, the trustees failed to make these payments within the time permitted in the "Agreement." At no time did Adolph deliver written notice or declare a default as provided in the escrow agreement.

The gross income reported by A. K. Co. for the years here in issue totaled $250,005.95. Of this amount $231,282.63 rep-

resented dividends received from corporate stock. Two hundred twenty-four thousand dollars of the total dividends received were distributed by Wolverine. As of January 1, 1964, A. K. Co. held 80,000 shares of Wolverine. It received an additional 20,000 shares in 1964 and an additional 100,000 shares in 1965 as the result of stock splits.

Wolverine is an outgrowth of a partnership begun by the Krause family in 1883. As of March 19, 1965, the Krause family owned 43.6 percent of the outstanding shares of Wolverine, the largest single stock interest in the company. Adolph was a member of the board of directors and president during all years pertinent hereto.

The possibility that the trustees of the children's and grandchildren's trusts will exercise any powers contained in the trusts on behalf of either petitioner is remote.

OPINION

On February 5, 1959, petitioners executed a partnership agreement wherein they formed a limited partnership known as A. K. Co. Contemporaneously, petitioners created six trusts; Adolph created three trusts naming their children as beneficiaries, and Janet created three trusts naming their grandchildren as beneficiaries. Simultaneous with the execution of the above-noted documents, Adolph executed a series of agreements wherein he agreed to transfer his 60-percent limited partnership interest in A. K. Co. to the six trusts for $100 cash and 80 percent of the income received by the trusts from A. K. Co. for a period of 16 years. Fifteen percent of the limited partnership interest was allocated to each of the three children's trusts and 5 percent was allocated to each of the three grandchildren's trusts. The first issue presented for our determination is whether the trusts are bona fide partners in the limited partnership under section 704(e), I.R.C. 1954,[3] which states in part:

3. All statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

SEC. 704(e). FAMILY PARTNERSHIPS.—

(1) RECOGNITION OF INTEREST CREATED BY PURCHASE OR GIFT.—A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * * *

(3) PURCHASE OF INTEREST BY MEMBER OF FAMILY.—For purposes of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons.

It is apparent that the capital interest possessed by the six trusts in A. K. Co. was a material income-producing factor; the income reported by the partnership consisted of rents and dividends, both of which were derived from capital investment and not the personal services of the partners.

This decision does not however fully answer the issue before us. The House Ways and Means Committee in discussing the effect of sections 191 and 3797(a)(2), I.R.C. 1939, enacted in 1951, the predecessors of section 704(e), stated in part:

> Your committee's amendment makes it clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new partner.
>
> * * * * *
>
> The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. Other cases will arise where the transferor retains so many of the inci-

dents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering* v. *Clifford* (309 U.S. 351). * * *

It is therefore manifest from the above language that though a person possesses a capital interest in a partnership in which capital is a material income-producing factor, he will not be recognized as a partner unless he is determined, from all of the facts and circumstances, to be the true owner of such interest.[4] See *Kuney* v. *Frank*, 308 F.2d 719 (C.A. 9, 1962), *Emil Morton*, 46 T.C. 723 (1966); *Mathew J. Spiesman, Jr.*, 28 T.C. 567 (1957), affd. 260 F.2d 940 (C.A. 9, 1958). It is this theory which respondent applied in attempting to tax petitioners rather than the trusts on the income of A. K. Co.

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4. Sec. 1.704—1(e)(1)(iii). *Requirement of complete transfer to donee.* A donee or purchaser of a capital interest in a partnership is not recognized as a partner under the principles of section 704 (e)(1) unless such interest is acquired in a bona fide transaction, not a mere sham for tax avoidance or evasion purposes, and the donee or purchaser is the real owner of such interest. To be recognized, a transfer must vest dominion and control of the partnership interest in the transferee. The existence of such dominion and control in the donee is determined from all the facts and circumstances. A transfer is not recognized if the transferor retains such incidents of ownership that the transferee has not acquired full and complete ownership of the partnership interest. * * *

* * * * *

(2) *Basic tests as to ownership.* * * * (ix) *Donees as limited partners.* The recognition of a donee's interest in a limited partnership will depend, as in the case of other donated interests, on whether the transfer of property is real and on whether the donee has acquired dominion and control over the interest purportedly transferred to him. * * * If the limited partner's right to transfer or liquidate his interest is subject to substantial restrictions (for example, where the interest of the limited partner is not assignable in a real sense or where such interest may be required to be left in the business for a long term of years), or if the general partner retains any other control which substantially limits any of the rights which would ordinarily be exercisable by unrelated limited partners in normal business relationships, such restrictions on the right to transfer or liquidate, or retention of other control, will be considered strong evidence as to the lack of reality of ownership by the donee.

After considering all of the factors in this case we are convinced respondent was correct in holding the trusts not the real owners of the partnership interest for income tax purposes; the donors retained too many incidents of ownership.

The partnership agreement prevented the trustees from assigning or disposing of the trusts' interest in the partnership without petitioners' consent. It was uncertain if the contributions of the limited partners would ever be returned. Each petitioner had the right to remove the trustees of the trust created by the other. Thus, each petitioner had, for all practical purposes, the right to require the trustees to distribute income and, at the end of 12 years, the principal of the trust created by the other spouse. Adolph was to receive 80 percent of the income distributed by the partnership to the trusts. The trustees failed to pay the agreed 80 percent of distributed partnership income within the specified time period thereby permitting Adolph to revoke the entire sales agreement and reacquire the partnership interest. The reason for the late payment was apparently due to late distribution by the partnership. Such distributions were controlled by petitioners as general partners, i.e., petitioners had the power to maintain or void the entire transaction. Lastly, we note that the major source of A. K. Co.'s income was received as dividends from its holding in Wolverine. Adolph was president and director of Wolverine and he and his family controlled 43 percent of its outstanding stock. It therefore seems apparent that the income received by A. K. Co. and, in turn, distributed to the trusts was controlled by Adolph. See *Toor* v. *Westover*, 200 F.2d 713 (C.A. 9, 1952); *Kuney* v. *Frank*, *supra*; *Roy C. Acuff*, 35 T.C. 162 (1960); *Henry S. Reddig*, 30 T.C. 1382 (1958); *Fred M. Harvey*, 21 T.C. 1020 (1954), and *Leeb* v. *Jarecki*, 156 F. Supp. 6 (N.D. Ill. 1957).

We of course realize that a power to remove a trustee, or the bootstrap sale of a property interest,[5] or the ability to rescind a

5. Note however sec. 704(e)(3) treats all purchases between family members as gifts.

transaction due to nonpayment does not require an unfavorable determination. See Income Tax Regs., sec. 1.674(d)-2(a); *Commissioner* v. *Brown*, 380 U.S. 563 (1965). However, these factors taken together, along with the others enumerated above, clearly indicate the overwhelming power and authority retained by petitioners. In short, they retained a present income interest and reserved the right to reacquire the principal interest.

Petitioners contend however that their failure to void the transaction and reacquire the partnership interest demonstrates the petitioners' good faith and the true substance of the transaction. In addition they note that due to their strong financial position there would be no occasion when petitioners would consider reacquiring the partnership interest, further indicating the validity of the transaction.

We cannot agree. As the Supreme Court stated in *Corliss* v. *Bowers*, 281 U.S. 376, 378 (1930):

> income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Further, in *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 705 (1949), the Supreme Court noted:

> it is immaterial whether such a present or future interest, absolute or contingent, remains in the grantor because he deliberately reserves it or because, without considering the consequences, he conveys away less than all of his property ownership and attributes, present or prospective. In either event the settlor has not parted with all of his presently existing or future contingent interests in the property transferred

See also *Commissioner* v. *Lester*, 366 U.S. 299 (1961); cf. *Pacific Coast Music Jobbers, Inc.*, 55 T.C. 86 (1971).

Upon an examination of the entire record we conclude that the petitioners were the true owners of the limited partnership interest, and therefore the income attributable to such interest is taxable to them.

Having determined that the trusts are not the true owners of the partnership interest, it would seem unnecessary to consider the merits of the second issue. However, as the facts indicate, the six trusts held an insignificant amount of additional property which produced dividend and interest income. We therefore are required to decide whether petitioners are taxable on this income. This necessitates that we determine (a) if the reciprocal-trust doctrine is applicable to the instant case and, if the answer be in the affirmative, (b) whether the trusts are controlled by the grantor trust provisions.

Respondent contends that the reciprocal-trust doctrine is applicable to the instant case and therefore each petitioner is considered to be the grantor of the trust created by his or her spouse. Petitioners on the one hand assert that the reciprocal-trust doctrine is inapplicable to the present set of facts, but even if determined to be applicable, it does not cause petitioners to be taxed on the trust income as the grantor trust provisions have not been violated.

We agree with respondent. The Supreme Court in *United States* v. *Estate of Grace*, 395 U.S. 316 (1969), in affirming the validity of the reciprocal-trust doctrine in the estate tax area, specifically section 2036(a)(1), stated:[6]

> we hold that application of the reciprocal trust doctrine is not dependent upon a finding that each trust was created as a *quid pro quo* for the other. Such a "consideration" requirement necessarily involves a difficult inquiry into the

6. See also *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 705 (1949), wherein the Supreme Court stated:

> "In the *Church* case we stated that a trust transaction cannot be held to alienate all of a settlor's 'possession or enjoyment' under * * * [sec. 2036] unless it effects a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. * * *' "

> subjective intent of the settlors. Nor do we think it necessary to prove the existence of a tax-avoidance motive. As we have said above, standards of this sort, which rely on subjective factors, are rarely workable under the federal estate tax laws. Rather, we hold that application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries.[7] [395 U.S. at 324. Footnote omitted.]

Further, this doctrine has been held to apply to the income tax as well as the estate tax area. See *Estate of Newberry*, 17 T.C. 597 (1951), revd. 201 F.2d 874 (C.A. 3, 1953), on the facts but not on the above-noted principle of law; *Margaret Batts Tobin*, 11 T.C. 928 (1948), reversed in part 183 F. 2d 919 (C.A. 5, 1950), in the facts but not on the principle of law; *Henry F. Hadleman*, 6 T.C. 345 (1946); *Werner A. Wieboldt*, 5 T.C. 946 (1945); *Purdon Smith Whiteley*, 42 B.T.A. 316 (1940).

The trusts in the instant case were interrelated; all were created on the same day, named the same trustees and contained identical provisions. The primary beneficiaries were the natural objects of the grantors' bounty. However, each trust contained provisions permitting the trustees to pay the accumulated income and corpus to the grantor's spouse. It is therefore apparent that, though petitioners mutually desired to make provision for their children and grandchildren, they did not wish such provision to separate them irrevocably from financial security. Hence the "crossed" power to aid each other. As a result they maintained the same economic position throughout the entire transaction. As the Second Circuit stated in *Lehman* v. *Commissioner*, 109 F. 2d 99, 100 (C.A. 2, 1940), affirming 39 B.T.A. 17 (1939), the case which initiated the reciprocal-trust doctrine:

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7. The required life-beneficiary status would seem to be included so as to meet the requirements of sec. 2036(a)(1). No such requirement is contained in the grantor trust provisions.

Petitioners however contend that section 671 which states in part:

> No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

precludes the applicability of the reciprocal-trust doctrine to the grantor trust provisions. Further, they argue that section 677(a) which provides:

> SEC. 677. INCOME FOR BENEFIT OF GRANTOR.
>
> (a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust * * * whose income * * * may be—
>
> (1) distributed to the grantor or the *grantor's spouse;*
>
> (2) held or accumulated for future distribution to the grantor or the *grantor's spouse;* or
>
> (3) applied to the payment of premiums on policies of insurance on the life of the grantor or the *grantor's spouse* * * *. [Emphasis supplied.]

closes the "loophole" present in the instant case. Petitioners point out however that such language was added with the enactment of the "69 Tax Reform Act," after the taxable years in question.

We cannot agree with either argument. First, section 671 merely precludes the applicability of any other section in taxing the grantor on the income of the trust. It does not prevent the use of the reciprocal-trust doctrine. As will be seen *infra,* the reciprocal-trust doctrine is applied only so that this Court can determine whether in fact petitioners are taxable under the grantor trust provisions. Secondly, Congress in amending section 677 to include grantor "or the grantor's spouse" clearly was not attempting to deal with a reciprocal trust.[8] Rather, as we

8. The reciprocal-trust doctrine covers not only husband and wife, but brother and sister, parent and child, and very possibly two complete strangers.

noted above, the courts first disposed of this issue in *Lehman* v. *Commissioner, supra,* a decision promulgated in 1940. The addition of the term "spouse" merely contemplated a situation wherein "*a* trust [is] created by *a* taxpayer for the benefit of his spouse." (Emphasis supplied. H. Rept. No. 91-413 (Part 1), 91st Cong., 1st Sess., p. 97 (1969), 1969-3 C.B. 261)

Having determined the applicability of the reciprocal-trust doctrine, thereby treating each petitioner as the grantor of the trust created by his or her spouse, we must now decide whether any portion of the grantor trust provisions is applicable so as to tax petitioners on the income of the trust.

Respondent asserts that, pursuant to sections 677, 676, or 674, petitioners are to be treated as the owners of the trusts. We need look no further than section 677(a)(2), which provides as follows:

> SEC. 677. INCOME FOR BENEFIT OF GRANTOR.
>
> (a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be—
>
> * * * * * *
>
> (2) held or accumulated for future distribution to the grantor or the grantor's spouse; or

In the case before us the pertinent parts of the trust agreements provided that the trustees, nonadverse parties,[9] could accumulate the trust income; they could terminate the trust after

9. SEC. 672. DEFINITIONS AND RULES.

(a) ADVERSE PARTY.—For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. * * *

(b) NONADVERSE PARTY.—For purposes of this subpart, the term "nonadverse party" means any person who is not an adverse party.

12 years, and the trustees could then pay all accumulated income and corpus back to petitioners. Such circumstances require application of section 677(a)(2). *Ralph L. Humphrey*, 39 T.C. 199 (1962).

Petitioners contend however that the last sentence of section 677(a) renders section 677(a)(2) impotent on the present set of facts. It states:

> SEC. 677(a). * * * This subsection shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the expiration of a period such that the grantor would not be treated as the owner under section 673 if the power were a reversionary interest but the grantor may be treated as the owner after the expiration of the period unless the power is relinquished.

This same contention was raised in *Ralph L. Humphrey*, *supra*. The Tax Court in rejecting petitioners' argument affirmed the rationale applied by respondent in its regulations. It is therein provided:

> The exception set forth in the last sentence of section 677(a) does not apply merely because the grantor must await the expiration of a period of time before he can receive or exercise discretion over previously accumulated income of the trust, even though the period is such that the grantor would not be treated as an owner under section 673 if a reversionary interest were involved. Thus, if income (including capital gains) of a trust is to be accumulated for 10 years and then will be, or at the discretion of the grantor may be, distributed to the grantor, the grantor is treated as the owner of the trust from its inception. [Sec. 1.677(a)-1(f), Income Tax Regs.]

Following the decision in *Humphrey*, we also reject petitioners' contention.

Having determined that petitioners, through the application of the reciprocal-trust doctrine and grantor trusts provisions, are taxed on the income of the trusts, we must now decide to

what extent they must be taxed. The Supreme Court in *United States* v. *Estate of Grace, supra,* held that the petitioner would be required to include in the deceased's estate, the value of the trust created by his spouse, "to the extent of mutual value," 395 U.S. at 324. In *Cole's Estate* v. *Commissioner,* 140 F. 2d 636 (C.A. 8, 1944), deceased and his spouse created trusts for the benefit of each other. However, deceased funded his trust with 700 shares of stock while his spouse contributed only 300. The Eighth Circuit held that petitioner was required to include the fair market value of 300 shares of stock, the mutual value. Compare *Estate of Laura Carter,* 31 T.C. 1148 (1959).

In the instant case the three trusts created by Adolph were funded with $100 and 50 shares of Wolverine, while Janet's trusts contained $100 and only 25 shares of Wolverine. Therefore, following the rationale of *Grace,* petitioners are taxed to the extent of the income produced by 25 shares of Wolverine held by each of the six trusts.

We note in passing that had we in fact determined the trusts to be the true owners of the limited partnership interest, thereby relieving petitioners from liability under the auspices of section 704, they would still be subject to tax under the reciprocal-trust doctrine and grantor trust provisions enunciated immediately above.

Decision will be entered under Rule 50.

APPENDIX C.

Internal Revenue Code of 1954 (26 U. S. C.).

Subpart E—Grantors and Others Treated as Substantial Owners.

Sec. 671. Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the exent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual. Any remaining portion of the trust shall be subject to subparts A through D. No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

Sec. 672. Definitions and Rules.

(a) ADVERSE PARTY.—For purposes of this subpart, the term "adverse party" means any persons having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

(b) NONADVERSE PARTY.—For purposes of this subpart, the term "nonadverse party" means any person who is not an adverse party.

(c) RELATED OR SUBORDINATE PARTY.—For purposes of this subpart, the term "related or subordinate party" means any nonadverse party who is—

(1) the grantor's spouse if living with the grantor;

(2) any one of the following: The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

For purposes of sections 674 and 675, a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or nonexercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.

(d) RULE WHERE POWER IS SUBJECT TO CONDITION PRECEDENT.—A person shall be considered to have a power described in this subpart even though the exercise of the power is subject to a precedent giving of notice or takes effect only on the expiration of a certain period after the exercise of the power.

Sec. 673. Reversionary Interests.

(a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income therefrom if, as of the inception of that portion of the trust, the interest will or may reasonably be expected to take effect in possession or enjoyment within 10 years commencing with the date of the transfer of that portion of the trust.

* * * * *

(c) REVERSIONARY INTEREST TAKING EFFECT AT DEATH OF INCOME BENEFICIARY.—The grantor shall not be treated under subsection (a) as the owner of any portion of a trust

where his reversionary interest in such portion is not to take effect in possession or enjoyment until the death of the person or persons to whom the income therefrom is payable.

(d) POSTPONEMENT OF DATE SPECIFIED FOR REACQUISITION.—Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest shall be treated as a new transfer in trust commencing with the date on which the postponement is effected and terminating with the date prescribed by the postponement. However, income for any period shall not be included in the income of the grantor by reason of the preceding sentence if such income would not be so includible in the absence of such postponement.

Sec. 674. Power to Control Beneficial Enjoyment.

(a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(b) EXCEPTIONS FOR CERTAIN POWERS—Subsection (a) shall not apply to the following powers regardless of by whom held:

(1) POWER TO APPLY INCOME TO SUPPORT OF A DEPENDENT.—A power described in section 677(b) to the extent that the grantor would not be subject to tax under that section.

(2) POWER AFFECTING BENEFICIAL ENJOYMENT ONLY AFTER EXPIRATION OF 10-YEAR PERIOD.—A power, the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the expiration of a period such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the expiration of the period unless the power is relinquished.

(3) POWER EXERCISABLE ONLY BY WILL.—A power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(4) POWER TO ALLOCATE AMONG CHARITABLE BENEFICIARIES.—A power to determine the beneficial enjoyment of the corpus or the income therefrom if the corpus or income is irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions).

(5) POWER TO DISTRIBUTE CORPUS.—A power to distribute corpus either—

(A) to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries) provided that the power is limited by a reasonably definite standard which is set forth in the trust instrument; or

(B) to or for any current income beneficiary, provided that the distribution of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to the beneficiary as if the corpus constituted a separate trust.

A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(6) POWER TO WITHHOLD INCOME TEMPORARILY.—A power to distribute or apply income to or for any current income beneficiary or to accumulate the income for him, provided that any accumulated income must ultimately be payable—

(A) to the beneficiary from whom distribution or application is withheld, to his estate, or to his appointees (or persons named as alternate takers in de-

fault of appointment) provided that such beneficiary possesses a power of appointment which does not exclude from the class of possible appointees any person other than the beneficiary, his estate, his creditors, or the creditors of his estate, or

(B) on termination of the trust, or in conjunction with a distribution of corpus which is augmented by such accumulated income, to the current income beneficiaries in shares which have been irrevocably specified in the trust instrument.

Accumulated income shall be considered so payable although it is provided that if any beneficiary does not survive a date of distribution which could reasonably have been expected to occur within the beneficiary's lifetime, the share of the deceased beneficiary is to be paid to his appointees or to one or more designated alternate takers (other than the grantor or the grantor's estate) whose shares have been irrevocably specified. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after-adopted children.

(7) POWER TO WITHHOLD INCOME DURING DISABILITY OF A BENEFICIARY.—A power exercisable only during—

(A) the existence of a legal disability of any current income beneficiary, or

(B) the period during which any income beneficiary shall be under the age of 21 years,

to distribute or apply income to or for such beneficiary or to accumulate and add the income to corpus. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(8) POWER TO ALLOCATE BETWEEN CORPUS AND INCOME.—A power to allocate receipts and disbursements as between corpus and income, even though expressed in broad language.

(3) EXCEPTION FOR CERTAIN POWERS OF INDEPENDENT TRUSTEES.—Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor—

(1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or

(2) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

A power does not fall within the powers described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(d) POWER TO ALLOCATE INCOME IF LIMITED BY A STANDARD.—Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions of paragraph (6) or (7) of subsection (b) are satisfied, if such power is limited by a reasonably definite external standard which is set forth in the trust instrument. A power does not fall within the power described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after adopted children.

Sec. 675. Administrative Powers.

The grantor shall be treated as the owner of any portion of a trust in respect of which—

(1) POWER TO DEAL FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.—A power exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party enables the grantor or any person to purchase, exchange, or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate consideration in money or money's worth.

(2) POWER TO BORROW WITHOUT ADEQUATE INTEREST OR SECURITY.—A power exercisable by the grantor or a nonadverse party, or both, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security except where a trustee (other than the grantor) is authorized under a general lending power to make loans to any person without regard to interest or security.

(3) BORROWING OF THE TRUST FUNDS.—The grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan, including any interest, before the beginning of the taxable year. The preceding sentence shall not apply to a loan which provides for adequate interest and adequate security, if such loan is made by a trustee other than the grantor and other than a related or subordinate trustee subservient to the grantor.

(4) GENERAL POWERS OF ADMINISTRATION.—A power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holding of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of stocks or securities of corpora-

tion in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; or (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.

Sec. 676. Power to Revoke.

(a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner upon any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

(b) POWER AFFECTING BENEFICIAL ENJOYMENT ONLY AFTER EXPIRATION OF 10-YEAR PERIOD.—Subsection (a) shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the expiration of a period such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest. But the grantor may be treated as the owner after the expiration of such period unless the power is relinquished.

Sec. 677. Income for Benefit of Grantor. (Sec. 677(a), (b) was Amended by Sec. 332(a)(1), (2) of the Tax Reform Act of 1969, Pub. Law 91-172, Approved December 30, 1969, by Adding the Material Enclosed in [ ]. This Amendment Was Made Applicable by Sec. 332(b) of That Act in Respect of Property Transferred in Trust After October 9, 1969.)

(a) GENERAL RULE.—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be—

(1) distributed to the grantor [or the grantor's spouse];

(2) held or accumulated for future distribution to the grantor [or the grantor's spouse]; or

(3) applied to the payment of premiums on policies of insurance on the life of the grantor [or the grantor's spouse] (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

This subsection shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the expiration of a period such that the grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the expiration of the period unless the power is relinquished.

(b) OBLIGATIONS OF SUPPORT.—Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary [(other than the grantor's spouse)] whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts shall be considered to be an amount paid or credited within the meaning of paragraph (2) of Section 661(a) and shall be taxed to the grantor under section 662.

Sec. 678. Person Other Than Grantor Treated as Substantial Owner.

(a) GENERAL RULE.—A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:

(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

(b) EXCEPTION WHERE GRANTOR IS TAXABLE.—Subsection (a) shall not apply with respect to a power over income, as originally granted or thereafter modified, if the grantor of the trust is otherwise treated as the owner under sections 671 to 677, inclusive.

(c) OBLIGATIONS OF SUPPORT.—Subsection (a) shall not apply to a power which enables such person, in the capacity of trustee or co-trustee, merely to apply the income of the trust to the support or maintenance of a person whom the holder of the power is obligated to support or maintain except to the extent that such income is so applied. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income of the taxable year, such amounts shall be considered to be an amount paid or credited within the meaning of paragraph (2) of section 661(a) and shall be taxed to the holder of the power under section 662.

(d) EFFECT OF RENUNCIATION OR DISCLAIMER.—Subsection (a) shall not apply with respect to a power which has been renounced or disclaimed within a reasonable time after the holder of the power first became aware of its existence.

Sec. 704. * * *

(e) FAMILY PARTNERSHIPS.—

(1) RECOGNITION OF INTEREST CREATED BY PURCHASE OR GIFT.—A person *shall* be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

(2) DISTRIBUTIVE SHARE OF DONEE INCLUDIBLE IN GROSS INCOME.—In the case of any partnership interest

created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

(3) PURCHASE OF INTEREST BY MEMBER OF FAMILY.—For purposes of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trusts for the primary benefit of such persons.

Internal Revenue Code of 1939.

Sec. 191. Family Partnerships.

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service. For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family"

of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

Sec. 3797. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) Person.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

(2) Partnership and partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

Michigan Statutes Annotated.

§ 20.54] Character of limited partner's contribution. SEC. 4. The contributions of a limited partner may be cash or other property, but not services. (CL '48, § 449.204.)

§ 20.57] Limited partner not liable to creditors. SEC. 7. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. (CL '48, § 449.207.)

§ 20.69] Assignment of limited partner's interest. SEC. 19. (1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

* * * * *